SUPREME COURT, U. S.

No. 837

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES WILLIAM WEBSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court (Appendix A, *infra*) is not reported.

JURISDICTION

On September 9, 1969, the district court entered an order before trial granting appellee's motion to dismiss both counts of a two-count indictment charging the unlawful shipment of a quantity of marihuana from California to Illinois, in violation of 26 U.S.C. 4755(b) (count 1), and the use of the United States Mail in making an unlawful transfer of marihuana not pursuant to a written order form, in violation of 18 U.S.C. 1403 (a)(1)(count 2). The court's de-

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cision rested on the ground that conviction under these statutes would violate appellee's privilege against self-incrimination. Notice of appeal to this Court was filed in the district court on October 9, 1969.

The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from a decision "sustaining a motion in bar, when the defendant has not been put in jeopardy." See *United States* v. *Covington*, 395 U.S. 57; *United States* v. *Blue*, 384 U.S. 141, *United States* v. *Murdock*, 284 U.S. 141.

QUESTIONS PRESENTED

1. Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of violating 18 U.S.C. 1403(a)(1) by using the mails to make a transfer of marihuana not pursuant to a written order form in violation of 26 U.S.C. 4742(a).

2. Whether the assertion of the privilege against self-incrimination provides a complete defense to a charge of shipping marihuana interstate in violation of 26 U.S.C. 4755(b).

STATUTES INVOLVED

26 U.S.C. 4755(b), set forth in full in Appendix B, *infra*, provides in pertinent part:

> (b) Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marijuana * * * from any State * * * into any other State * * *. Nothing contained in this subsection shall apply—

> (1) to any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive.
>
> * * * * *

18 U.S.C. 1403(a)(1), set forth in full in Appendix B, *infra*, provides in pertinent part:

> (a) Whoever uses any communication facility [including the mails] in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy the penalty for which is provided in—
>
> (1) subsection (a) or (b) of 7237 of the Internal Revenue Code of 1954,[1]
>
> * * * * *
>
> shall be imprisoned not less than two and not more than five years * * *.

STATEMENT

Appellee was charged in a two-count indictment in the United States District Court for the Northern District of Illinois with violating statutes relating to the shipment and transportation of marihuana. Count 1 charged that on or about April 7 and 8, 1969, he shipped by way of the United States mail approximately 953 grams of marihuana from California into Illinois, in violation of 26 U.S.C. 4733(b). Count 2 charged that on these same dates, appellee violated 18

[1] Insofar as pertinent here subsection (b) of Section 7237 prescribes the penalty for transferring marihuana not pursuant to a written order form of the transferee in violation of 26 U.S.C. 4742(a).

U.S.C. 1403(a)(1) by using a communications facility, the United States mail, in the commission of an offense under 26 U.S.C. 4742(a), viz., transferring this marihuana not pursuant to a written order of the transferee.

On appellee's motion, the district court dismissed both counts of the indictment on the ground that appellee's privilege against self-incrimination would provide a complete defense to the prosecution. With respect to Count 2, the district court considered itself bound by the Seventh Circuit's decision in *Santos* v. *United States*, holding that assertion of the privilege against self-incrimination bars prosecution of a transferor of marihuana under 26 U.S.C. 4742(a) (Appendix A, *infra*, pp. —). The court dismissed Count 1 of the indictment, premised on 26 U.S.C. 4755(b), on the ground that compliance with that statute creates the same risk of self-incrimination which this Court held in *Leary* v. *United States*, 395 U.S. 6, precludes conviction under 26 U.S.C. 4744(a) (Appendix A, *infra*, pp. —).

THE QUESTIONS ARE SUBSTANTIAL

1. The issue presented by the district court's dismissal of Count 2, charging a violation of 18 U.S.C. 1403(a)(1) by using the mails in the commission of an unlawful transfer of marihuana without receipt of an order form, essentially turns on whether the privilege against self-incrimination is a complete de-

[1] No. 16955, C.A. 7, decided August 18, 1969. The government has filed a petition for a writ of certiorari to review the judgment of the court of appeals in *Santos*, No. 861, this Term.

fense to a charge under 26 U.S.C. 4742(a), of transferring marihuana not pursuant to a written order of the transferee. This underlying issue is presently before this Court in *Buie* v. *United States*, No. 271, this Term. As we argue in that case, Section 4742(a) does not require a prospective transferor of marihuana to disclose any information at all, but merely forbids him from making a transfer unless the transferee produces an order form which he has obtained from the Secretary of Treasury. In short, we urge that the statutory provision involved in *Buie* does not impose any obligation of self-incrimination on the transferor and, therefore, that he has no defense of his non-compliance under the principles articulated by this Court in *Marchetti* v. *United States*, 390 U.S. 39, and *Leary* v. *United States*, 395 U.S. 6. In view of the pendency of *Buie*, it would also be appropriate for the Court to rule authoritatively on the derivative issue involved here—*i.e.*, the availability of the self-incrimination defense to a transferor who uses a communication facility to transfer marihuana without receipt of an order form from the transferee.

2. In dismissing Count 2 of the indictment on self-incrimination grounds, the district court similarly misconceived the reach of *Leary* v. *United States*, *supra*. The statutory provision on which Count 2 is based—26 U.S.C. 4755(b)—makes it unlawful for anyone, except certain enumerated classes of persons,[3]

[3] The seven exceptions provided for in the statute are: (1) persons who have registered and paid the special tax required by Sections 4751 to 4753 inclusive, (2) common carriers, (3) employees of persons who have complied with the registration provisions and who are acting within the scope of their employ-

to ship, send, carry, or transport marihuana in interstate commerce. One of the classes of persons exempted from the prohibition against interstate transportation are persons who have registered and paid the special occupational tax as handlers of marihuana under Sections 4751 to 4753. Although the district court's reasoning is not fully articulated, it apparently believed that the statutory scheme offered appellee an opportunity to immunize himself from prosecution under Section 4755(b) by registering and paying the occupational tax. The court found that this route to lawful interstate transportation of marihuana was indistinguishable, in practical effect, from the obligation to obtain an order form and pay the transfer tax in order to acquire marihuana lawfully under Sections 4741(a) and 4744(a). Since *Leary* held that prosecution under Section 4744(a) was barred by assertion of the privilege against self-incrimination, the district court concluded that the appellee had a complete defense to the Section 4755(b) charge in this case.

The fundamental defect in the district court's reasoning is the erroneous premise that an illicit possessor of marihuana would be permitted to register and pay the occupational tax and thereby legalize his interstate transportation of marihuana. If the court's premise were true, the opportunity thus afforded an

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ment, (4) persons making deliveries of marihuana prescribed or dispensed by registered practitioners, (5) persons carrying marihuana obtained from a registered dealer pursuant to a written prescription issued by a registered practitioner, (6) persons who, as patients, have obtained the marihuana from a registered practitioner and, (7) certain government officials acting within the scope of their official authority.

illicit possessor, who would risk self-incrimination by registering, would present a difficult question. But the fact is that persons who may not lawfully possess marihuana under State law may not register and pay the tax under Sections 4751–4753. Such persons can comply with Section 4755(b) in only one way—by refraining from transporting marihuana interstate.

There is nothing in the statutory scheme of the Marihuana Tax Act which supports the district court's assumption that an illegal trafficker in marihuana would be permitted to register. On the contrary, the statutory scheme and implementing regulations show that only those who desire to handle marihuana legitimately are authorized to register and pay the occupational tax. In enumerating the classes of professionals subject to the occupational tax (and thus derivatively to the registration requirement), Section 4751 follows the classification of persons who, under Section 3–7 of the Uniform Narcotics Drug Act, may lawfully manufacture, wholesale, dispense, prescribe, or possess marihuana. Moreover, the regulations also expressly provide that a person may not register unless he can satisfy the district director of Internal Revenue that he is qualified under State law to conduct the business or activity for which registration is sought. (See, e.g., 26 C.F.R. 152.22, 152.23.)[4]

The decision of this Court in *Leary* is entirely consistent with our position here. That case dealt only

[4] The relevant statutory and regulatory provisions in this regard are set forth in the Appendix to the Brief for the United States in *Leary* v. *United States*, No. 65, O.T. 1968; see also this Court's opinion in *Leary*, *supra* 390 U.S. at 14.

with the obligations imposed on a transferee of marihuana who acquired or transported and concealed marihuana without paying the *transfer* tax imposed by 26 U.S.C. 4741(a). From the language of the Act and its legislative history, the Court in *Leary* found "that Congress *did* intend that a nonregistrant should be able to obtain an order form and prepay the transfer tax" (395 U.S. at 20, emphasis added; see also *id.* at 21–23) and that, insofar as the administrative regulations indicated otherwise "they must be regarded as contrary to the statute, and hence beyond the scope of the regulation-making authority which was delegated by Congress" (*id.* at 24). Significantly, however, the Court pointed out that "there is strong support in the legislative history for the proposition that illicit consumers of marihuana like petitioner [*Leary*] are not entitled to register" and pay the occupational tax under Sections 4751–4753. The Court further noted that the Senate and House Reports, as well as the testimony of the Treasury Department's Assistant General Counsel contained identical statements that "'[u]nder [the bill's] provisions all legitimate handlers of marihuana are required to pay occupational taxes. . . .'" (395 U.S. at 24 n. 38).

Leary, in short, did not decide the question of whether *illegal* handlers of marihuana are permitted to register or pay the occupational tax—indeed it suggested otherwise. If, as we urge, the statutory scheme does not permit the registration of illegal handlers, then the appellee here, if his possession of marihuana is unlawful, cannot comply with exception (1) of 26

U.S.C. 4755(b). As to him the statute is simply prohibitory. Indeed, all seven exceptions to Section 4755 (b) apply only to lawful activity. None requires persons engaged in illegitimate activities to reveal their own wrongdoing. The statute merely prohibits unlawful conduct and in no way creates a real and substantial danger of self-incrimination.

CONCLUSION

This case affords an opportunity to resolve an important question not reached in *Leary*, as well as one closely related to the issue now before the Court in *Buie*. In these circumstances it is respectfully submitted that probable jurisdiction should be noted.

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EDWARD FENIG,
Attorneys.

DECEMBER 1969.

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APPENDIX A

In The United States District Court
For The Northern District Of Illinois

Eastern Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES WILLIAM WIERNICK, DEFENDANT

MEMORANDUM OPINION

Defendant's Preliminary Motions

This is a criminal action in which defendant James William Wiernick is charged, in Count One, with transporting marihuana in violation of 26 U.S.C. § 4755(b) and, in Count Two, with unlawfully using the United States Mail in order to transport marihuana in violation of 18 U.S.C. § 1403(a)(1). Defendant has filed a motion to dismiss the indictment.

As his first ground for dismissal, defendant asserts that the indictment is duplicitous in that each count of the indictment charges two offenses. A charge is duplicitous if it joins in a single count two or more distinct offenses. The test as to duplicity is the presence or absence of the need for separate proof for each aspect of the act. See generally, Orfield, Federal Criminal Rules §§ 8.36, 8.43 (1966). Where, however, several acts are part of the same transaction or offense, there is no duplicity.

Each count of the instant indictment states that on or about April 7 and 8, 1969, defendant did specified unlawful acts. A fair reading of each count does not suggest that multiple violations occurred, but that a continued violation took place over a two day period. Consequently, neither count seems fatally duplicitous. Compare *United States* v. *Cohen,* 35 F.R.D. 227, 231 (N.D. Cal. 1964).

Defendant next attacks the constitutionality of the statutes under which he was indicted. Count Two charges a violation of 18 U.S.C. § 1403(a)(1). That statute makes unlawful the use of communication facilities in committing or attempting to commit an offense for which the penalty is provided in 26 U.S.C. § 7237(b). Among other things, Section 7237(b) deals with the sale or transfer of marihuana in violation of 26 U.S.C. § 4742(a). In essence, then, Count Two charges the unlawful use of a communications facility in committing or attempting to commit an unlawful transfer of marihuana.

Defendant contends that compliance with the written order provision of Section 4742 would violate his Fifth Amendment privilege under *Leary* v. *United States,* 395 U.S. 6 (1969). The government disputes this contention. In an opinion handed down after the government filed its brief, the Seventh Circuit, citing *Leary,* reversed a conviction premised upon Section 4742(a) holding that the privilege against self-incrimination was an adequate defense to such a conviction. *Santos* v. *United States,* — F.2d — (7th Cir. Slip. Op. at 3–4, August 19, 1969). The reasoning of

the *Santos* opinion compels dismissal of Count Two of the instant indictment, which is also premised on a violation of 26 U.S.C. § 4742(a).

Count One of the instant indictment charges a violation of 26 U.S.C. § 4755(b). In general this section prohibits the transportation of any marihuana across state lines. Seven categories of persons are, however, exempt from this prohibition. Among the exempt are those persons who have registered and paid a special occupational tax pursuant to 26 U.S.C. §§ 4751–53. It is defendant's contention that a conviction for failure to register and pay the required tax would violate his Fifth Amendment privilege against self-incrimination as set forth in *Leary v. United States*, 395 U.S. 6 (1969). In response, the government has merely stated that *Leary* involved other statutes and is not applicable to this case.

The statute invoked in Leary's case provided that for those persons required to pay the transfer tax imposed by 26 U.S.C. § 4741(a), it was unlawful to transport or conceal any marihuana. 26 U.S.C. § 4744 (a)(2). Section 4741(a) imposed a transfer tax on all persons who were required to use special order forms under Section 4742. Section 4742, in turn, and subject to exceptions not relevant to Mr. Leary or the defendant in this case, required every transferee of marihuana to obtain a proper transfer form. After a similar review of the statutory situation, 395 U.S. at 14–15, the Court then stated:

> "If read according to its terms, the Marihuana Tax Act compelled petitioner to expose himself to a 'real and appreciable' risk of self-incrimi-

nation, within the meaning of our decisions in Marchetti, Grosso, and Haynes. Sections 4741–4742 required him, in the course of obtaining an order form, to identify himself not only as a transferee of marihuana but as a transferee who had not registered and paid the occupational tax under §§ 4751–4753. Section 4773 directed that this information be conveyed by the Internal Revenue Service to state and local law enforcement officials on request.

"Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marihuana 'would surely prove a significant "link in a chain" of evidence tending to establish his guilt' under the state marihuana laws then in effect. When petitioner failed to comply with the Act, in late 1965, possession of any quantity of marihuana was apparently a crime in every one of the 50 States, including New York, where petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted." *Id.* at 16.

While Leary was prosecuted under 26 U.S.C. § 4744 (a)(2) and Santos under Section 4744(a)(1), Wiernick is being prosecuted under 26 U.S.C. § 4755(b). However, the government's contention that Leary is not applicable because different statutes are involved is absurd. The constitutional problems of the defendant are indistinguishable from those faced by Leary and Santos. Under 26 U.S.C. § 4751, every person who deals in marihuana must pay a special occupational tax. Different categories of persons are taxed differently, and those who do not fall within a special

occupational provision, but who deal in marihuana, are covered by subsection five, 26 U.S.C. § 4751(5). Persons who are subject to the tax, and that means all those who deal in marihuana, must register with a local internal revenue service office, 26 U.S.C. § 4753 (a). Registrants are subject to make disclosures concerning their harvest or receipt of marihuana. 26 U.S.C. § 4754.

Consequently, the danger of self-incrimination under state law was as real for Wiernick as it was for Leary and Santos. See Leary, *supra*, at 16, n. 14. California, the place from which the marihuana was sent according to the indictment, via Cal. Health & Safety Code 11530, and Illinois, the alleged destination of the marihuana, via Ill. Rev. Stat. Ch. 38, §22–3, both prohibit the possession of marihuana. However, some exceptions are made to this general rule. See, e.g., Cal. Health & Safety Code §§ 11330–33; Ill. Rev. Stat. Ch. 38, § 12. Usually, those exempted under state law are still required to register and pay an occupational tax under 26 U.S.C. §§ 4751–53 or are exempt from the order form and transfer tax requirements of 26 U.S.C. § 4742(b). Thus, as in *Leary*, at the time defendant allegedly failed to comply with the law.

> "those persons who might legally possess marihuana under state law were virtually certain either to be registered under § 4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently

> suspect of criminal activities. Since compliance with the . . . tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination." 395 U.S. at 18.

In sum, for defendant to have paid the occupation tax imposed by Section 4751(a) and to have registered pursuant to Section 4753(a) might have incriminated him under existing state laws. Such self-incrimination is prohibited under the interpretation of the Fifth Amendment as explained in *Leary*. Count One of the indictment must be dismissed as well.

Enter:

ABRAHAM L. MARKOVITZ.

Date: SEPTEMBER 9, 1969.

APPENDIX B

26 U.S.C. 4755 (b) provides:

(b) Transportation.—Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession of the United States, or from any State, Territory, the District of Columbia, or any other State, Territory, the District of Columbia, or insular possession of the United States. Nothing contained in this subsection shall apply—

(1) to any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive;

(2) to any common carrier engaged in transporting marihuana;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) To any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753 and employed to prescribe for the patient patient receiving such marihuana;

(5) to any person carrying marihuana which has been obtained by the person from a registered dealer in pursuance of a written prescription referred to in section 4742(b)(2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, if the bottle or other container in which such marihuana is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying marihuana which has been obtained by the person as a patient from a registered physician, dentists, or other practitioner in the course of his professional practice if such marihuana is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official within the scope of his official duties.

18 U.S.C. 1403 provides:

(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in—

(1) subsection (a) or (b) of section 7237 of the Internal Revenue Code of 1954.

(2) subsection (c), (h), or (i) of sec-

tion 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. sec. 174, or

(3) the Act of July 11, 1941, as amended (21 U.S.C. sec. 184a), shall be imprisoned not less than two and not more than five years, and, in addition, may be fined not more than $5,000. Each separate use of a communication facility shall be a separate offense under this section.

(b) For purposes of this section, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication.

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